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COURT OF APPEAL, FOURTH DISTRICT

DIVISION TWO

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

TYRONE L. SMITH,

Defendant and Appellant.

E028930

(Super.Ct.No. FVA012445)

O P I N I O N

APPEAL from the Superior Court of San Bernardino County. Walter Blackwell, Judge. Modified and affirmed with directions.

Lewis A. Wenzell, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Raquel M. Gonzalez, Supervising Deputy Attorney General, and Elizabeth S. Voorhies, Deputy Attorney General, for Plaintiff and Respondent.

FACTUAL AND PROCEDURAL BACKGROUND

On September 24, 1999, defendant and his cohort robbed an Arco mini-market in Fontana. An information charged defendant with second degree robbery (Pen. Code, § 211, count 1),¹ second degree burglary (§ 459, count 2) and assault with a firearm (§ 245, subd. (a)(2), count 3). Also, the information alleged he personally used a firearm during the commission of the robbery (§§ 12022.5, subd. (a)(1), 12022.53, subd. (b)). A jury found he was guilty of all charges and the firearm allegation was true. The trial court sentenced him to state prison for 15 years 8 months consisting of the following: the upper 5-year term on count 1, a consecutive 10-year upper term for the section 12022.53 firearm use enhancement and a consecutive 8-month term (1/3 of the midterm) on count 2. Pursuant to section 654, the trial court imposed and stayed sentence for count 3 and for the section 12022.5, subdivision (a) firearm use enhancement.

DISCUSSION

Defendant appeals, contending (1) the sentence imposed on the burglary count should have been stayed pursuant to section 654 and (2) the trial court failed to state reasons for imposing the upper term on the robbery count.

1. The sentence imposed on count 2 must be stayed, pursuant to section 654. As defendant aptly argues and the People correctly concede, section 654 proscribes separate, consecutive sentences for defendant's convictions of robbery (count 1) and burglary (count 2) because the crimes were part of an indivisible transaction.

¹All statutory references are to the Penal Code unless otherwise indicated.

Section 654 provides in pertinent part: “An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. . . .”

In this case, of course, the two convictions involved separate criminal acts. However, the Supreme Court has long applied section 654 to preclude multiple punishment where multiple acts or offenses were committed incident to a single intent and objective. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1211.)

“Burglary consists of entry into a house or other specified structure with the intent to commit a felony. [Citation.] Thus, ordinarily, if the defendant commits both burglary and the underlying intended felony, Penal Code section 654 will permit punishment for one or the other but not for both. [Citations.]” (*People v. Centers* (1999) 73 Cal.App.4th 84, 98.) Here, the evidence established the burglary was committed as a means of accomplishing the robbery. The multiple-victim exception is inapplicable because both crimes were committed against one victim. Defendant failed to object below, but imposition of consecutive sentences in these circumstances constituted an “unauthorized sentence” that defendant could challenge for the first time on appeal. (*People v. Hester* (2000) 22 Cal.4th 290, 295.)

In view of the foregoing, we will order the abstract of judgment amended to reflect that the eight-month prison term imposed for defendant’s burglary conviction (count 2) is stayed pursuant to section 654, subdivision (a).

2. Defendant failed to object when the trial court imposed the upper term on the

robbery conviction.

Defendant argues that a remand for resentencing is required because the trial court failed to state reasons for imposing the five-year upper term on his robbery conviction. However, his failure to object when the trial court imposed the term waived appellate review of his argument. (*People v. Scott* (1994) 9 Cal.4th 331, 353.)

Before the court imposed sentence, it stated it had read and considered the probation report. It also stated it was “inclined to follow the recommendation of the probation department,” which included the five-year upper term on defendant’s robbery conviction. Defendant failed to object then and later when the court imposed the recommended sentence. In these circumstances, defendant waived appellate review of the issue.

DISPOSITION

The judgment is affirmed. The clerk of the superior court is directed to issue an amended abstract of judgment which reflects that the term imposed on defendant’s burglary conviction, count 2, is stayed pursuant to section 654. The clerk is further directed to transmit a certified copy of the amended abstract to the Department of Corrections.

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HOLLENHORST

Acting P. J.

We concur:

McKINSTER

J.

GAUT

J.